Supreme Court, U.S.
FILED

(1)

No. 001735 DEC 1 - 2000

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IN THE
SUPREME COURT OF THE UNITED STATES

THIRUSELVAM SAKTHIVEIL

Petitioner,

vs.

ROY OSBORN

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the
State of Arizona

PETITION FOR A WRIT OF CERTIORARI

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21 pp

I.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Court err in failing to enforce the alleged violation of Rules of Professional Conduct where an attorney failed to bill or otherwise inform a client of claimed legal services charges for 22 months?

2. Does the Statute of Frauds bar an attorney's claim for recovery of fees against a client for services allegedly provided over a period in excess of one year in the absence of a written fee agreement, billing or other memoranda? Should a standard of "reasonableness" in evaluating possibility of performance within one year be applied?

LIST OF PARTIES

The parties of this proceeding are petitioner Thiruselvam Sakthiveil and Roy Osborn

TABLE OF CONTENTS

OPINION BELOW 6

STATEMENT OF JURISDICTION 6

STATUTES INVOLVED 7

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 12

TABLE OF AUTHORITIES

1. Arizona Rules of Professional Conduct 1.4 and 1.5

2. Statutes of Frauds A.R.S. §44-101

PETITION FOR WRIT OF CERTIORARI

Petitioner Thiruselvam Sakthiveil respectfully prays that a Writ of Certiorari issue to review the opinion of the Arizona Court of Appeals Division One entered in the above proceeding on December 9, 1999.

OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One is not published. It is reprinted in the Appendix to this Petition. The unreported order denying the motion for reconsideration is reprinted in the Appendix, and the unreported order denying the petition for review is reprinted in the Appendix.

BASIS FOR JURISDICTION OF THE COURT

Petitioner files this writ from the denial by the Arizona Supreme Court of Petitioner's Petition for Review. This is a petition to review a judgement entered by a state court of last resort.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Arizona Rules of Professional Conduct 1.4 and 1.5

2. Statutes of Frauds A.R.S. §44-101

STATEMENT OF THE CASE

This proceeding is a claim by Roy Osborn my former attorney for legal services alleged to have been performed in a case that will be referred to as Valley of the Sun (VSS). I come before the Supreme Court because the conduct of a licensed attorney who operates without a fee agreement, does not send a send a bill for legal services for over 22 months, then submits a bill for in excess of $30,000.00 and then the courts of the State of Arizona permit a recovery by the licensed attorney can not and should not be allowed to occur. The fact situation which is the subject matter of this proceeding calls out for direction and parameters of action and permissible inaction by attorneys in the interaction with their clients.

In the present case I met with Mr. Osborn in early 1995 to discuss the VSS case and two other matters (Trial Transcript 2/22/99 pgs 45, 46). Written fee agreements were signed and retainers for legal services paid in connection with the two other matters which will be referred to as the Kilber and Pessinger matters. (Trail Transcript 2/22/99 pg 101). At no time did the parties sign a written agreement in the VSS matter. Nor did Mr. Osborn request an attorney's fee retainer in the VSS matter. (Trail Transcript 2/22/99 pg 106). Mr. Osborn's representation in the VSS matter commenced in February 1995 and continued through January 1997. At no time during said 22 months did Mr. Osborn send a bill to me explaining or delineating legal services charges. (Trial Transcript 2/22/99 pg 108).

The reason there were no bills or request for payment over the extended period of time was that at the outset of the representation Mr. Osborn expressed a willingness to and did agree to look to an award of

attorney's fees from the defendant in the VSS matter as his sole source for payment (Trial Transcript 2/23/99 pg 35, 40). The VSS matter involved a breach of lease with an express provision for an award of attorney's fees in the lease agreement. When Mr. Osborn sought the recovery of attorney's fees on an hourly basis he appeared at the trial without a single time sheet, nor any other independent time-keeping source of record to corroborate the services alleged to be performed or time claimed to have been expended. (Trial Transcript 2/22/99 pg 117).

At the outset of the representation in the VSS matter Mr. Osborn required and I paid a cost retainer in the amount of $2,000.00 (Trial Transcript 2/22/99 pg 146). Mr. Osborn did send interim statements for costs which were paid. In fact the record reflects that Mr. Osborn was so conscientious in his demand for payment of costs when due, that he submitted a bill for a cost payment in the amount of $1.52. (Trial Transcript 2/22/99 pg 115). A similar demand for payment for attorney's fees was never made during the close to two years of Mr. Osborn's involvement. In fact to this date a billing has never been prepared by Mr. Osborn and submitted to me. The only delineation of charges eventually prepared was in the form of an Affidavit dated December 2, 1996 files in the VSS matter. This is consistent with my contention of the fee arrangement that Mr. Osborn was to look to the Court for an award of attorney's fees at the conclusion of the case.

After unsatisfactory results were achieved in both the Kilber and Pessinger matter there was a disagreement about the fees Mr. Osborn was seeking in the Kilber matter (Trial Transcript 2/23/99 pg 37). It is important to note that although I believed no additional fees were due to Mr. Osborn, when I paid those fees to Mr. Osborn, he still did not send a bill in the VSS matter. It would be reasonable to conclude that if a controversy between an attorney and client arose in one matter the charges in any other pending matters would be demanded or certainly addressed. However, faced with a controversy concerning fees in the Kilber matter Mr. Osborn did not send a bill, make a demand for payment or require a written agreement in the VSS matter. It is important to note that at one point Mr. Osborn did present a blank fee

agreement in the VSS matter for the purpose of having documentation to support his eventual claim for attorney's fees against the Defendant in the VSS matter. I was unwilling to sign the agreement because the blanks were not filled in (Trial Transcript 2/23/99 pg 34 l. 1-18). My unwillingness to sign a fee agreement should have triggered the submission of a bill by Mr. Osborn or a motion to withdraw if indeed there was an obligation to pay on an hourly basis.

REASON THIS PETITION SHOULD BE GRANTED

It is urged that an important issue of law was incorrectly decided or not adequately addressed as it relates to the application of the ethical rules for attorneys and the interaction throughout the country between attorneys and clients. As stated at the outset, the obligation of an attorney to keep a client apprised on the status of proceeding is a basic and essential element of the judicial system. In the present case it is undisputed that Plaintiff did not send a bill or make any demand for payment for legal services for 22 months.(Trial Transcript 2/22/99 pg 113 1 109). In affirming the judgment the Court has sanctioned excused and to some extent encouraged said conduct rather than issuing a directive that the language of E.R. 1.4 instructs that a lawyer must

"explain a matter to the extent reasonable necessary to permit the client to make informed decisions regarding the **representation**" (emphasis added)

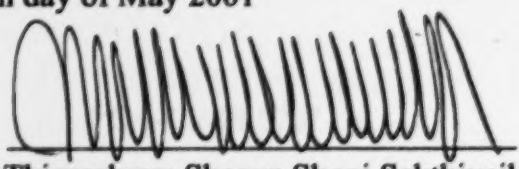
The key word for consideration is representation. Had there been an intention to limit the attorney's obligation to communicate and explain just the merits of a case and not the financial aspects of the representation the rule would have so stated. However, the term representation imposes an affirmative duty on attorneys to keep their clients apprised of accruing charges and other economic issues of the case. Plaintiff in the present case acknowledged that at one point the Defendant discussed that he wanted to "drop the case" and "go back to Stockholm", (Trial Transcript 2/22/99 pg 123 1 16-25 pg 124 1. 1 10.) Had the Plaintiff complied with his responsibilities and informed his client about the claimed accrued and accruing charges, the client could have made an informed decision about continuing with the litigation. Review should be granted so that this Court can send a directive to the legal community that if an attorney seeks to be paid he/she has an affirmative duty to either establish the fee arrangement in writing or keep the client reasonably apprised of accruing charges. It does little to foster the public's perception of attorneys when they are permitted to abruptly drop a bill for over $30,000.00 of attorneys fees after 22 months of silence.

The Statute of Frauds A.R.S. §44-101 was designed to prevent the precise situation that arose in this proceeding. The Statute of Frauds requires a writing when seeking to enforce an agreement not to be performed within one year. The Statute of Frauds is intended to bar a person from coming forward after an extended period of time and contending that certain terms of an oral agreement obligate the other party retroactively. In the present case Mr. Osborn accepted a $2000.00 cost retainer and carried on the representation for over 22 months without an agreement for legal services in writing nor did he generate a billing, correspondence or memoranda during that period confirming the existence of an hourly fee agreement or obligation for payment. Review should be granted to confirm an attorney's or other contracting party's burden of proof necessary when he/she seeks compensation for payment for services allegedly rendered over an extended period of time in the absence of a written agreement. In the absence of review the public policy objectives of the performance within one year provision of the Statute of Frauds are circumvented.

CONCLUSION

For the reasons stated above Petitioner prays for a writ of certiorari to issue

Respectfully submitted this 11th day of May 2001



Thiruselvam Shosun Shoni Sakthiveil

APPENDIX I

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROY A. OSBORN, Plaintiff-Appellee, v. THIRUSELVAM SAKTHIVEIL, Defendant-Appellant.	1 CA-CV 99-0267 DEPARTMENT D MEMORANDUM DECISION (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 97-02561

The Honorable William P. Sargeant, III, Judge

AFFIRMED

George M. Sterling, Jr.
Attorney for Plantiff-Appellee Phoenix

Ivy L. Kushner
Attorney for Defendant-Appellant Scottsdale

LANKFORD, Judge

Defendant Thiruselvam Sakthiveil appeals the jury verdict awarding Plaintiff Roy A. Osborn $30,580. Sakthiveil raises numerous issues on appeal, which we have distilled into the following questions:

1. Did the trial court err in awarding prejudgement interest?

2. Did the trial court err in denying Defendant's motions for directed verdict and judgement notwithstanding the verdict ("JNOV") alleging that Plaintiff's claim was not supported by the evidence?

3. Did the trial court err in denying Defendant's motion for a new trial based on alleged misconduct of counsel?

4. Did the trail court err in denying Defendant's motion to dismiss based on the statute of frauds and Plaintiff's alleged violation of Arizona Rules of Professional Conduct 1.4 and 1.5?

5. Did the trial court err in failing to give the Defendant's requested jury instruction?

6. Did the trial court err in failing to credit Defendant for $2,000 previously paid to Plaintiff for costs?

We exercise jurisdiction under Arizona Revised Statutes Annotated ("A.R.S.") sections 12-120.21(A)(1) (1992), -2101(B) (1994).

The facts are as follows. Osborn sued Sakthiveil for $30,580 in past due attorney's fees incurred during Osborn's representation of Sakthiveil in the Valley of the Sun School ("VSS") case. Osborn contended that he and Sakthiveil entered into a verbal agreement in February 1995 that he would represent Sakthiveil in the VSS case for $200 an hour plus costs. Osborn attached an affidavit of his attorney's fees in the VSS case to his verified complaint. Sakthiveil admitted in his answer that he had retained Osborn as his attorney from February 16, 1995 through January

3, 1997 in the VSS case. However, Sakthiveil contends that Osborn was to be paid on a contingent fee basis: Osborn would receive fees to the extent that fees were awarded to Sakthiveil in the VSS case. Sakthiveil did pay $2,000 to Osborn in February 1995 as an advance for costs.

Arbitrator Dean R. Cox presided over the mandatory arbitration hearing. In April 1998, Cox ruled in Osborn's favor and awarded him $30,580 for attorney's fees incurred during the VSS case, plus $10,362.50 in attorney's fees and court costs incurred in arbitration. Sakthiveil appealed the arbitration award to superior court. A jury found in favor of Osborn and awarded him $30,580. The court also awarded Osborn prejudgement interest and arbitration costs and fees.

Sakthiveil first contends that the trial court erred by awarding Osborn prejudgement interest, both on the principal amount of $30,580 and on the arbitrator's award of fees and costs. This Court reviews the award of prejudgement interest de novo. *See Alta Vista Plaza, Ltd., v. Insulation Specialists Co.*, 186 Ariz. 81, 82, 919 P.2d 176, 177 (App. 1996); *Employer's Mutual Casualty Co. v. McKeon*, 170 Ariz. 75, 77, 821 P.2d 766, 768 (App. 1991).

Whether a party's claim is liquidated or unliquidated determines if that party is entitled to prejudgement interest. *See Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 137, 907 P.2d 506, 523 (App. 1995). Prejudgement interest is a matter of right, not discretion, if the claim is liquidated. See A.R.S § 44-1201(A) (Supp. 1998); *Hyatt Regency*, 184 Ariz. at 138, 907 P.2d at 524. A claim is liquidated if the evidence provided includes data, that if taken as true, enables the trier of fact to calculate the award with exactness and without reliance on discretion or expert opinion. *See Hyatt Regency*, 184 Ariz. at 138-39, 907 P.2d at 523-24; *Canal Ins. Co. v. Pizer,* 183 Ariz. 162, 164, 901 P.2d 1192, 1194 (App. 1995). Conversely, the trier of fact determines the amount of unliquidated damages, such as non-economic tor damages, based on the evidence, including expert opinion. *See Canal Ins. Co.*, 183 Ariz. at 164, 901 P.2d at 1194. Prejudgement interest is usually unavailable in unliquidated damages claims. *See id.*

Relying on Schwartz v. Schwerin, 85 Ariz. 242, 336 P. 2d 144 (1959) Sakthiveil contends that Osborn's claim was unliquidated. In Schwartz, the Arizona Supreme Court stated that when compensation for legal services is not fixed by the parties, the attorney must seek quantum meruit. *See id.* at 245, 336 P.2d at 142 Claims for attorney's fees based on quantum meruit are unliquidated damages. *See id.* at 249, 336 P.2d at 151. Therefore, interest on unliquidated damages is not available until final judgement is rendered. *See id.* at 250, 336 P.2d at 152.

This case differs from *Schwartz* because the amount was calculable. The principal amount was based on an hourly rate, and Osborn established the rate and number of hours in his fee affadavit filed with the verified complaint. Osborn sued Sakthiveil for exactly the $30,580 detailed in the affadavit, a liquidated claim. Moreover, Sakthiveil neither disputed that there was an attorney fee contract between the party nor the amount claimed, and disputed only whether the contract was hourly or contingent. "A claim is not considered unliquidated merely because the jury must find certain facts in favor of the plaintiff in order to determine the amount of damages. All that is necessary is that the evidence furnish data which, *if believed*, makes it possible to compute the amount of damages. All that is necessary is that the evidence furnish data which, *if believed*, makes it possible to compute the amount with exactness." *Trus Joist Corp. v. Safeco Ins. Co. of America*, 153 Ariz. 95, 109, 735 P.2d 125, 139 (App. 1986). A party's good faith dispute of a liquidated claim does not bar a prejudgement interest award. *See La Paz County v. Yuma County*, 153 Ariz. 162, 168, 735 P.2d 772, 778 (1987); *Fleming v. Pima County*, 141 Ariz. 149, 155, 685 P.2d 1301, 1309 (1984); *Banner Realty, Inc., v. Turek*, 113 Ariz. 62, 64-65, 546 P.2d 798, 800-01 (1976).

Sakthiveil also contends no prejudgement interest could be awarded on the arbitrator's award of fees and costs. We have held that, absent a statutory provision to the contrary, a trial court can award prejudgement interests as of the date of entry of the original arbitration award. *See Creative Builders, Inc., v. Avenue Dev., Inc.*, 148 Ariz. 452, 457-58, 715 P.2d 308, 313-14 (App. 1986). Under A.R.S. section 12-133(E)

(Supp. 1998) "[t]he [arbitration] award shall be entered by the court in its record of judgements, and shall have the effect of a judgement upon the parties unless reversed upon appeal." Although Sakthiveil appealed the arbitration award, the trial court affirmed that award. Therefore, A.R.S. section 12-133(E) is not contrary to our ruling in *Creative Builders*. The court could have awarded prejudgement interest as of April 10, 1998. The trial court did not err in awarding prejudgement interest.

The second issue on appeal is whether the trial court erred by denying Sakthiveil's motion for directed verdict and motion JNOV[1] based on insufficiency of evidence. We review a denial of directed verdict motion de novo. *See Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). When reviewing a denial of a directed verdict motion, "we view the evidence and all reasonable inferences there from in the light most favorable to the nonmoving party," in this case, Osborn. *Id.* The test for granting a directed verdict is whether the "facts presented in support of the claim have so little probative value that reasonable people could not find for the claimant." *Id.* The standard of review for a denial of motion JNOV is also de novo. *See id.* at 66, 952 P.2d at 304. When reviewing motions JNOV, we also review the facts in the light most favorable to the nonmoving party. *See id.* at 65, 952 P.2d at 303. We will sustain the trial court's ruling unless we determine that the proffered facts could not reasonably support the plantiff's claim. *See id.*

Sakthiveil argued that no credible evidence supported the contention that there was an hourly payment arrangement. He asserts that Osborn failed to present any evidence of time records that corroborated the services performed and time expended.

After reviewing the record and evidence admitted in the light most favorable to sustaining the verdict, we find that sufficient evidence exists. Osborn testified that he and Sakthiveil had entered into an oral

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[1] This motion is now denominated a motion for "judgement as a matter of law" by Rule 50 of the Arizona Rules of Civil Procedure. For simplicity, we use the parties' terminology.

agreement for legal representation in the VSS case at a rate of $200.00 per hour plus costs. He also stated that the oral arrangement was not unusual because while he had previously represented him on an hourly basis without one. Osborn said that the prior hourly rates were the same or nearly the same rate claimed for the VSS case. Osborn also testified that he informed Sakthiveil that Sakthiveil was responsible for attorney's fees. Osborn's time records and two fee affidavits prepared for the VSS case were admitted into evidence. Although Sakthiveil contends that this evidence was not credible in light of the evidence in his favor, this argument asks us to reweigh the evidence, which we may not do. *See Brown v. U.S. Fidelity & Guar. Co.*, 194 Ariz. 85, 91-92, 977 P.2d 807, 813-14 (App. 1998); *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993).

Sakthiveil also contends that *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) precludes a fee award because Osborn lacked time records. However, Osborn did present time records in the form of time memoranda. Although these were not handwritten original entries, *Schweiger* does not require that the records be handwritten.

Sakthiveil also contended that Osborn failed to establish a time frame for performance or payment and thus did not prove the resulting failure to perform which constituted a breach of contract.[2] The burden of proving a contract lies with the party asserting it as evidenced by showing the existence of the contract, its breach, and the consequential damages. *See Graham v. Asbury*, 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975); *Payson Sanitary Dist. of Gila County v. Zimmerman*, 119 Ariz. 498, 502, 581 P.2d 1148, 1152 (App. 1978).

Sakthiveil's contention that Osborn failed to show a time frame for performance or payment is misplaced. The parties entered into an oral agreement for legal representation. "It is a fundamental principle of contract law that where no time is specified for performance, a

[2] Sakthiveil also asserts this as a reason that the new trial motion should have been granted. Our treatment of the question disposes of the entire issue.

reasonable time is implied. What constitutes a reasonable time is ordinarily a question of fact." *Dutch Inns of America, Inc., v. Horizon Corp.*, 18 Ariz. App. 116, 119, 500 P.2d 901, 904 (1972). Although we are not bound by the trial court's view of this element. *see id.* at 120, 500 P.2d at 905, a reasonable time would be on demand at the conclusion of the representation. *Cf. Estate of Musgrove v. Brown*, 144 Ariz. 168, 171, 696 P.2d 720, 723 (App. 1985) (most courts hold that when a loan fails to specify time for repayment, it is repayable on demand). The trial did not err in denying Sakthiveil's motion for directed verdict or motion JNOV.

The third issue on appeal is whether the trial court erred by denying Sakthiveil's motion for a new trial based on alleged misconduct of counsel.[3] We review a trial court's denial of a new trial motion for abuse of discretion. *See Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990).

Sakthiveil contends Osborn's counsel engaged in misconduct by: (1) referring to Sakthiveil's history of previous legal representation in cross-examination and in closing argument, after the trial court barred such references; (2) discussing the status of the VSS case despite a ruling by the court; and (3) discussing in closing argument what a percentage fee would have been in the VSS case even though the amount of recovery in that case was not in evidence. Sakthiveil argues that Osborn's counsel's actions prejudiced him "as it impacted the jury's consideration of the status of the VSS case and wrongfully suggested a pattern or course of conduct [by Sakthiveil]."

The trial court denied Sakthiveil's motion "upon the basis that the claimed deficiencies did not, overall, deny defendant a fair trial and, further, that many of the objections were not preserved or waived." It is reversible error for a trial court to deny a new trial when there is significant misconduct, the misconduct is prejudicial in nature, and the misconduct succeeds in achieving its goals. *See Leavy v. Parsell*, 188 Ariz. 69, 73,

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[3] Sakthiveil also argued this as a ground for the JNOV motion. Our discussion of the misconduct issue in context of the new trial motion disposes of the entire issue.

932 P.2d 1340, 1344 (1997).

The trial court was not obliged to grant a new trial. First, the record does not support Sakthiveil's claim that "[a]t the outset of the trial the Court instructed that no such references were to be made [about Sakthiveil's relationship with his former attorneys] until the disposition of the Motion in Limine." Thus, Osborn's counsel did not engage in misconduct by questioning Sakthiveil about these relationships prior to any ruling. Additionally, the trial court instructed the jury to disregard questions properly objected to and sustained. Moreover, Osborn's counsel's references to Sakthiveil's relationship with former attorneys in closing argument were not misconduct. Although the trial court had granted a motion by Sakthiveil, the court's order prohibited Osborn's counsel from calling Mr. Heldebrand, Sakthiveil's former attorney, and Sakthiveil's daughters as witnesses. The trial court's ruling did not expressly prohibit Osborn's counsel from commenting on Sakthiveil's relationships with prior attorneys.

Second, Sakthiveil's counsel first introduced the VSS case during her opening statement and questioned Sakthiveil as to its status during direct examination. Sakthiveil cannot claim error or misconduct based on Osborn's cross-examination when Sakthiveil "opened the door" to this subject. *See State v. Soto-Fong*, 187 Ariz. 186, 193, 928 P.2d 610, 617 (1996); *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981); *State v. Gilreath*, 107 Ariz. 318, 320, 487 P.2d 385, 387 (1971).

Third, Sakthiveil failed to object to Osborn's comment on percentages of the attorney's fees in the VSS case. Failure to object during closing arguments constitutes waiver, unless the objectionable statement cannot be cured by instruction or admonition. *See Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 214, 693 P.2d 348, 357 (App. 1984); *Standage v. Tarpey*, 8 Ariz. App. 342, 346, 446 P.2d 246, 250 (1968). We do not find the comments incurable. The trial court properly admonished and instructed the jury that it was to consider only the evidence presented and that the attorney's statements were not evidence. A new trial was not required.

The next issue on appeal is whether the trial court erred by denying

Sakthiveil's motion to dismiss alleging that (1) the statute of frauds barred Osborn's claim and (2) Osborn had violated Arizona Rules of Professional Conduct 1.4 and 1.5. We review denials of motions to dismiss for abuse of discretion. See *Appels-Meehan v. Appels*, 167 Ariz. 182, 183, 805 P.2d 415, 416 (App. 1991); *State ex rel. Corbin v. Portland Cement Ass'n,* 142 Ariz. 421, 424, 690 P.2d 140, 143 (App. 1984). The trial court did not err en denying Sakthiveil's motion to dismiss.

First, the statute of frauds did not bar Osborn's claim. Because Osborn represented Sakthiveil in the VSS case concerning only one of fourteen properties, it was a reasonable possibility that he could have completed his legal representation within one year. It is entirely possible that Osborn could have settled the VSS case within one year, or he could have gone to trial within one year, or the court could have dismissed the VSS case within one year. As the Ninth Circuit has stated:

> Under Arizona law, contracts which are not to be performed within one-year from making of the contracts must be in writing. Ariz. Rev. Stat. § 44-101. The one-year provision of the statute of frauds is narrowly construed...The mere possibility that performance can be completed one year -- even if not completed within one year -- is usually sufficient to remove the agreement from the statute of frauds.

Western Chance #2, Inc., v. KFC Corp., 957 F.2d 1538, 1541 (9th Cir. 1992) (citing *Co-op Dairy, Inc., v. Dean*, 102 Ariz. 573, 575, 435 P.2d 470, 472 (1967); *Waugh v. Lennard*, 69 Ariz. 214, 226, 211 P.2d 806, 813-14 (1949); *Healey v. Coury*, 162 Ariz. 849, 353, 783 P.2d 795, 799 (App. 1989)). Furthermore, "[t]he fact that performance is completed in more than one year inmaterial." *Western Chance*, 957 F.2d at 1541 (citing *Healey*, 162 Ariz. at 353, 783 P.2d at 799). Because the statute of frauds did not bar Osborn's claim, the trial court did not err in denying Sakthiveil's motion to dismiss based

on this contention.[4]

Moreover, the trial court did not abuse its discretion in rejecting Sakthiveil's contention that Osborn had violated Arizona Rules of Professional Conduct 1.4[5] and 1.5.[6] Review of Osborn's fee affadavits details that Osborn discussed the VSS case with Sakthiveil in person or via telephone at least 42 times during his 20 months of representation. He also communicated with Sakthiveil through written correspondence and telephone messages. Additionally, Sakthiveil's own testimony indicated that he was able to make informed decisions throughout the course of Osborn's representation. Osborn complied with the requirements of ER 1.4 and any claim to the contrary goes to the weight of the evidence. Similarly, Osborn did not violate ER 1.5. This rule does not always require a written fee agreement between the attorney and client. Furthermore, Osborn and Sakthiveil both testified that Osborn had represented Sakthiveil in several other matters, at least four of them without a written fee agreement. The trial court did not abuse its discretion by denying Sakthiveil's motion to dismiss.

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[4] Sakthiveil argues that it must be reasonable that the contract be completed within one year to remove the case from the statute of frauds. *See Apache Trailer Sales, Inc., v. Redman Indus. Inc.*, 117 Ariz. 504, 573 P.2d 904 (App. 1977). As the Ninth Circuit states, "[r]egardless of the merits of the minority view [in the *Apache Trailer* case], we are bound by the Arizona Supreme Court's construction and application of section 44-101....That court has yet to adopt the minority view." *Western Chance #2, Inc., v. KFC Corp.*, 957 F.2d 1538, 1541, n.4 (9th Cir. 1992) (citations ommited).

[5] ER 1.4 provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[6] ER 1.5 governs attorney conduct related to fees. ER 1.5(a) provides that attorneys' fees "shall be reasonable." ER 1.5(b) provides that if a "lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."

The next issue on appeal is whether the court erred in failing to give Sakthiveil's requested jury instruction number 5.[7] A "trial court has a duty to instruct the jury on all legal theories supported by the evidence." *Gemstar, Ltd., v. Ernest & Young,* 185 Ariz. 493, 503, 917, P.2d 222, 232 (1996) (citation omitted); *see AMERCO v. Shoen,* 184 Ariz. 150, 156, 907 P.2d 536, 542 (App. 1995). When a party challenges a trial court's refusal to give a requested jury instruction, we review the evidence in the light most favorable to the refused party. *See Gemstar*, 185 Ariz. at 503, 917 P.2d at 232; *AMERCO,* 184 at 156, 907 P.2d at 542. The trial court should give a party's instruction if any evidence tends to establish that party's theory of the case. *See Timmons v. City of Tucson*, 171 Ariz. 350, 355, 830 P.2d 871, 876 (App. 1991).

Sakthiveil requested that the trial court instruct the jury that "[p]arties can contract to provide that payment be made from a specific fund and no other. The parties may contract that particular fund is the only method of payment. The parties by contract may allocate the risk of non-payment." The trial court denied the instruction, reasoning that it was "more [of] a comment on the evidence than...is appropriate." Sakthiveil argues that this instruction was necessary to support his theory of the case that Osborn was to be paid only from an award of attorney's fees in the VSS case.

Even viewing the evidence in light most favorable to Sakthiveil, we do not find that the trial court erred in refusing the requested jury instruction. Although some evidence does support Sakthiveil's

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[7] Osborn argues that Sakthiveil waived this issue on appeal by failing to object to the trial court's refusal to give requested jury instruction number 5. *See* Ariz. R. Civ. P. 51 (a)(providing in part that "[n]o party may assign as error the...failure to give and instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."). Sakthiveil contends that Rule 51(a) must be read in conjunction with Rule 46. *See* Ariz. R. Civ. P. 46 (providing that the party must make his or her desired course of action or his or her objection known to the court and grounds therefore at the time the ruling is made or sought). *See also Valentine v. Faulkner,* 12 Ariz. App. 557, 560, 473 P.2d 482, 485 (1970) (stating that Rules 51(a) and 46 must be read in conjunction). Sakthiveil's counsel discussed the requested jury instruction in chambers prior to jury deliberations, and twice objected to the court's refusal to give that instruction stating her reasons for the instruction. Counsel preserved the issue for review.

contingent fee theory, "[i]t is not error for the court to refuse to give a requested instruction that is adequately covered by the instructions given." *Timmons*, 171 Ariz. at 355, 830 P.2d at 876. The trial court instructed the jury that the "[d]efendant claims that the contract was conditional and that the condition was not met or did not occur. Where performance of the contract is conditional, and that condition does not occur, the contract will not be enforced." This instruction adequately addressed Sakthiveil's theory that payment was contingent on the award of attorney's fees in the VSS case.

The final issue on appeal is whether the trial court erred in failing to credit Sakthiveil for $2,000 that he previously paid to Osborn in the VSS case. Sakthiveil contends that "[i]t is undisputed that the $2,000.000 was never credited." While it may be true that this sum was not credited against fees, it was not paid for fees but for costs. Osborn sued for $30,580 in attorney's fees from the VSS case; he did not sue Sakthiveil for reimbursement of costs. There is no evidence that the $2,000 paid was not credited against costs incurred by Osborn.

Osborn requests that this Court award reasonable attorney's fees incurred in this appeal. His fees are hereby awarded, see A.R.S. sections 12-133 (Supp. 1998), 341.01 (1992), subject to his compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

The judgement is affirmed.

JEFFERSON L. LANKFORD, Judge

CONCURRING:

EDWARD C. VOSS, Presiding Judge

RUDOLPH J. GERBER, Judge

APPENDIX II

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROY A. OSBORN,	)	1 CA-CV 99-0267
	)	
Plaintiff-Appellee,	)	DEPARTMENT D
	)	
v.	)	MARICOPA County
	)	Superior Court
THIRUSELVAM SAKTHIVEIL,	)	No. CV 97-02561
	)	
Defendant-Appellant.	)	**ORDER**
	)	

The Court, Presiding Judge Edward C. Voss and Judges Rudolph J. Gerber and Jefferson L. Lankford, participating, has considered Appellant's "Motion for Reconsideration," filed December 27, 1999.

IT IS ORDERED denying the motion.

IT IS FURTHER ORDERED that the clerk of this Court is directed to replace page 12 of the Memorandum Decision filed on December 9, 1999.

The following text has been deleted:

> "Because Osborn represented Sakthiveil in the VSS case concerning only one of fourteen properties, it was a reasonable possiblility that he could have completed his legal representation within one year."

The following text has replaced the deleted text:

> "It was possible for Osborn to have completed the legal representation within one year."

MARICOPA County
CV 97-02561

ORDER

IT IS FURTHER ORDERED that a copy of this Order, together with a copy of the replacement page be sent to each party appearing herein or the attorney for such party and to the Honorable William P. Sargeant, III, Judge.

DATED this 14th day of January, 2000.

JEFFERSON L. LANKFORD, Judge

January 14, 2000
MARICOPA COUNTY
SUPERIOR COURT
CV 97-02561

A true copy of the foregoing order was mailed January 14, 2000 to:

Mr. George M. Sterling, Jr.
ATTORNEY AT LAW
Suite 103
818 East Osborn Road
Phoenix, AZ 85014-5218
Attorney for Plantiff-Appellee

Ms. Ivy L. Kushner
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Suite 222
4300 North Miller
Scottsdale, AZ 85251
Attorney for Defendant-Appellant

Hon. William P. Sargeant, III, Judge
MARICOPA COUNTY SUPERIOR COURT
East Court Building
101 West Jefferson Street
Phoenix, AZ 85003-2205

Glen D. Clark, Clerk
By

_____
Deputy Clerk

APPENDIX III

Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

TELEPHONE: (602) 542-9396

September 29, 2000

RE: ROY A. OSBORN vs THIRUSELVAM SAKTHIVEIL
Arizona Supreme Court No. CV-00-0038 PR
Court of Appeals Division One No. 1 CA-CV 99-0267
Maricopa County Superior Court No. CV 97-02561

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 26, 2000, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 29th day of September, 2000.

Noel K. Dessaint, Clerk

TO:
George M. Sterling Jr., Esq.
Ivy L. Kushner, Esq.
Lexis-Nexis
West Publishing Company
Glen D. Clark, Clerk, Court of Appeals Division One, Phoenix

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